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Supreme Court, U.S.
FILED

001 606 APR 20 2001

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as
father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as
Governor of the State of Alabama and as
President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 96-D-169-N**

FORREST H."FOB" JAMES JR., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

In 1977, the Alabama legislature passed the first in a series of "school prayer" statutes. This first statute, which provided for a moment of silence at the beginning of the school day, *see Ala. Code* § 16-1-20 (1995), was supplemented in 1981 by a statute which specifically provided that the moment of silence "shall be observed for meditation or voluntary prayer." *Ala. Code* § 16-1-20.1 (1995). Then, in 1982, a third school prayer statute was passed which "recogniz[ed] that the Lord God is one" and permitted public school teachers to lead willing students in a specified prayer. *Ala. Code* § 16-1-20.2 (1995). Both the 1981 and 1982 statutes were struck down because they violated the Establishment Clause of the First Amendment to the United States Constitution. *See Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985) (section 16-1-20.1); *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984) (section 16-1-20.2).

In 1993 the Alabama Legislature enacted a fourth statute. The operative portion of § 16-1-20.3 reads:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995). In 1996, the plaintiffs filed this suit asserting, among other things, that § 16-1-20.3 is facially unconstitutional. Thus, the Court must decide whether this latest school prayer statute has been cured of the infirmities that rendered its predecessors proceedings in the Circuit Court of Etowah County.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2] Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines Inc. v. McCoy Restaurants Inc.*, 708 F.2d 582, 585 (11 Cir. 1983). The court is quick to note, however, that when a state court in effect asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Wesch v. Folsom*, 6 F.3d 1465 (11 Cir. 1993), *cert. denied*, 114 S. Ct 696; *Kelly v. Merrill Lynch*, 985 F.2d 1067 (llth Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (llth Cir. 1989); *McCoy*, 708 F.2d 582; *Southern Petrol. Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.*, 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution -- conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *Maryland v. Louisiana*, 451 U.S. 725,

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of

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746 (1981) (*citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore*, 611 So. 2d 1069, 1071 (Ala. 1993); *White v. Reynolds Metals Co.*, 558 So. 2d 912 (Ala. 1990), *cert. denied*, 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law require its citizens to follow those rights. (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code § 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

[3] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4 (a) (4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed

their Motion on the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot. to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as

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> no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with the requirements of Rule 59 (e). *See Fed. R. Civ. P.* 56(e) and 6.

[5] Rule 65 (d) provides:

> (d) Form and Scope of Injunction or Restraining Order.
> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. ...

Fed. R. Civ. P. 65(d).

well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.'" (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A)) Counsel stated that the purpose of the request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer.'" (*Id.* at 1.)

Counsel stated to the court that he sought a conference call with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12, 1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code § 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

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[7] Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a).

The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a). In the alternative, and in addition to the court's issuance pursuant to Rule 60(a), the court finds that Plaintiffs Motion To Alter Or Amend the Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24, 1997, to identify with specificity the evidence in the record at that time and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These submissions, pertinent to dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

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[8] The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of Alabama Code § 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

[9] This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997, and is detailed in these findings of fact and

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throughout the record. For example DeKalb Defendants Answers to Plaintiffs First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiff's Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories not answered on October 10, 1996) are part of Exhibit C to Plaintiff's Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filings responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents, affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of rewarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the defendants have recognized the wrongfulness of the conduct complained of;

and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years -- before and after Alabama Code § 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb

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[10] *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (llth Cir. 1982)(discussing substantial likelihood of recurrence).

County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to ontinue with the status quo of unconstitutional conduct in eKalb County public schools. (Nor is this the only such ress clipping with which the court has been deluged in is case.) The court can discern in this evidence no cognition of the wrongfulness of school-sponsored ligious activity, sees scienter in the vow to "resist" dicial action, and discerns no repentance of past nconstitutional conduct. The court does not mean to ngle out Mr. Carlisle for censure. The court finds this atement emblematic of DeKalb County school officials' istorical attitudes – judging from the record before the ourt, this statement typifies an attitude. The court eferences it specially because it is so recent.

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the Fort Payne Times Journal spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

The court also finds relevant that in Spring 1996, all arties executed an agreement that DeKalb County schools ould not undertake any practices alleged by the Plaintiffs be unconstitutional pending this court's determination of eir constitutionality. This agreement, styled "Joint lotion to Vacate This Court's Order and Agreement of oluntary Cessation of Certain Activity Pending this ourt's Decision" (hereafter "Joint Motion"), was filed ith the court in March 1996.

That document, in the court's view, constitutes a presentation of the parties *to the court*, even if the court uld not or would not enforce a voluntary agreement among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination -- and then continue with such conduct -- persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code § 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential cases.

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[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13] The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating

The Joint Motion promised that the school board Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

> "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"

> "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day. . . except that noncurricular clubs may meet

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hearing date.)

[14] Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

during noninstructional time;"

"prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

"distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;"[15]

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[15] The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

> "prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"
>
> "the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time."

(Joint Motion, ¶ 6 and subparts.)

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities. . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997 Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael

Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint

Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials professed ignorance of, the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed the videotape, and considers

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[16] That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr. Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pre-game prayers prior to the

t powerful evidence of DeKalb County Schools' defiance
›f Eleventh Circuit law as pronounced in *Jager* almost a
lecade ago as well as evidence of DeKalb County's
lisregard for the proceedings pending here. The videotape
eatures one of the intervenors,[17] a minor at Geraldine High

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iling of this lawsuit.

The court reiterates that there are two videotapes, one
ıcluding pre-suit graduation exercises and pregame prayer in a
eries of short clips and ending with the October 19, 1996 prayer
ver the public-address system by Ms. Sexton at Geraldine High
chool, and the other depicting the 1997 graduation prayer at
Collinsville, Plainview, and Sylvania as well as classroom prayer at
Geraldine. The videotape filed November 21 with the Motion to
Enforce includes the pre-suit graduation prayer as well as the post-
uit October 1996 football game prayer. The first videotape is
Exhibit B to the Plaintiffs' Motion to Enforce; the second, showing
ıe 1997 graduation prayers, is Exhibit B to the June 9, 1997
Declaration of Michael Chandler. (*See* Affidavit of Michael
Chandler, Feb. l, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's
Designation of Exhibits and Materials already in the Record for Rule
6 Purposes, n.4 (filed November 21, 1996).)

The intervenors were allowed in for the limited purpose of *amicus*
uriae participation. The court accepted affidavits from them. Had
ıey intervened timely, when this suit was filed or before summary
ıdgment submissions and the court's March 1997 opinion, the court
ould have granted intervention. The intervenors' affidavits do not
ıerit separate or extended discussion. Bible Clubs may meet
onsistent with the Equal Access Act; religious jewelry may be
orn; students may wear "Victory Line" t-shirts of the sort depicted
ı Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the
lternative, Motion to Strike, consistent with school policy; students
ıay organize the "Meet Me at the Pole" event; and may generally do

School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and

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all the things the court discussed at pages 23 and 24 of its earlier opinion -- and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

prayer in the classroom at Geraldine School. Once again, some of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as ¶ 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian address' or the designation of a student as 'historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

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[18] The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse*. Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

Mr. Chandler further testified in his June 9 Declaration that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch;

the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'one, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive- audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

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[19] *See* Exhibit A to Joint Motion.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the

> lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that "'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 opinion and Order, which makes express reference to the Eleventh Circuit's specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order. In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 - 3rd period - (Friday) - BACCALAUREATE PRACTICE - This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program -- just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this intermingling of the private religious service with the school-sponsored graduation ceremony;

the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In ¶ 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August

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[20] The court notes that "tradition" contemplates ongoing, repetitive conduct.

3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials: The letter expresses Mr. Chandler's concern that school officials had expressed that they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, ¶ 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a. permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See*, e.g., Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n.3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct; including a teacher's asking for student volunteers to pray was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with, DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb county filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce the terms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[21] Here, however, officials flagrantly defied the Eleventh Circuit rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 0pinion and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

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[21] *See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, ¶ 16.)[22] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in

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[23] Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

which it proceeds is out loud and in unison.

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state may not favor religion, even over-nonreligion.[24]

Most importantly, the court is disturbed by the uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in- service training repetitively or for all new hires but requires merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

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[24] *See County of Allegheny*, 492 U.S. at 590-91; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code § 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions" as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (2971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants Requests 5, 9, 11, 12, DeKalb

Defendants Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges -- the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

Stipulations resolve some issues.[25] Thus the court finds "[p]laintiff Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including school-related student assemblies, compulsory and non-compulsory school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

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[25] The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe School, which schools have students in grades K through 12." (Stipulation 15.)

The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation 58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See and compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").)[26]

The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb county, ¶ 18.) Specifically, Mr. Chandler testified in his February 1, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

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[26] Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27] Meaning the year preceding filing of the lawsuit.

The court notes that the DeKalb County Defendants,.in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at Plainview High School May 26, 1995 and that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February 1, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February 1, 1996 Affidavit of Michael Chandler.) Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb

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[28] The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager*, 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer.

Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code § 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb County, ¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995

Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code § 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code § 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

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[29] The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30] The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31] The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the First Amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee*, the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

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[32] The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33] *Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp* , 374 U.S. 203, 224-25 (1963).

[34] *See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

In the Eleventh Circuit, pursuant to *Jager*, "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school- sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that even nonsectarian prayer is proscribed.[37] The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

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[35] *See also Schempp*, 374 U.S. at 226; *Engel*, 370 U.S. at 430.

[36] *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for

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[37] *Lee*, 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are nonsectarian -- because the school board has claimed the statute authorizes the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in sectarian prayers, either.

[38] *See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See*, *e.g.*, 1995 program for Plainview High School showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February 1, 1996 Affidavit of Michael Chandler, excuse students from class for baccalaureate practice.[39]

Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and, that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

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[39] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203 (1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in "homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February l, 1996 Affidavit, "From what I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the fifth and twelfth grades. Mr. Chandler testified in his February 1, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the 12th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request f or Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

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[40] In *Schempp*, Bible readings opened the school day; the practice was struck as unconstitutional. *See also Berger*, 982 F.2d 1160, 1171 n.6 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school, a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that he permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41] The classroom is not traditionally a public forum.[42] The court notes that in *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] "The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

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[41] *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[42] *See Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43] The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

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[44] *Berger*, 982 F.2d at 1167.

[45] *Id.* at 1168.

[46] *Id.*

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the injunction can be modified to embody only the reasonable time restrictions of the policy.[47]

Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95 school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

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[47] The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, "Defendants admit that Ms. Carroll asked for volunteers to lead prayers." Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, student-initiated voluntary prayer, non-proselytizing, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and may regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50]The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

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[48] At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary qualities and that "such study of the Bible, when and historic presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

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[49] *Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd..*, 884 F. Supp. 1097 (E.D. Va. 1993).

[50] *Lee*, 505 U.S. at 592-95.

The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 opinion and order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.) This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe

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[51] DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18, 1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education. (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R:E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'nonsectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp's* admonition that no breach is trivial controls the court's analysis.

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[52] *See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview School. The court specifically finds that DeLayne Etherton's affidavit establishes that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God We Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

Plaintiffs' November 6, 1997 Motion to Enjoin Proceedings in the Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend: Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc*.

The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this

Supplemental Opinion and Order.[53]

The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[53] In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its Findings Of Fact And Conclusions Of Law articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions.

The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

[54] The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER.** Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States

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Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of neutrality toward religion" *Jager v. Douglas County School District*, 862 F.2d 824, 828 (11 Cir. 1989)(citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale*, 370 U.S. 421, 434 (1962).)

The right to be free from state-established religion lies at the heart of the concept freedom embodied in the First Amendment to the United States Constitution. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree*, 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist or agnostic schoolchildren to participate in Muslim religious activities just as the

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state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only -- under the First Amendment, each individual is entitled to their own beliefs free from state intrusion).

Regardless of whether state officials state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree*, 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53. ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, **the court's Permanent Injunction DOES NOT restrict schoolchildren's First Amendment rights** – *it actually protects those rights from unwarranted and unconstitutional interference from the state.*

Appendix F
IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

MICHAEL CHANDLER, et al.,

Plaintiffs, **CV 96-D-169-N**

v.

FOB JAMES, et al,

Defendants.

PERMANENT INJUNCTION

In accordance with the court's previous opinions, as well as the record as a whole in this cause, it is CONSIDERED and ORDERED as follows:

1. The Defendant Governor of Alabama, his successors in office, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing,

ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

2. The Attorney General of Alabama, his successors in office, and all those in active concert and participation with him or her, including, but not limited to, all deputy and assistants Attorneys General, are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

3. The Defendant Alabama State Board of Education, its officers, agents, servants, employees, successors and assigns, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

4. The Defendants, and each of them, Ed Richardson,

Bradley Byrne, Stephanie Bell, G.J. "Dutch" Higginbotham, Ethel H. Hall, Willie Paul, David F. Byers, Jr., Sandra Ray, and Mary Jane Caylor, and each of their successors in office, and all those in active concert and participation with each are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1- 20.3 and any regulations, directives, or policies implementing its provisions.

5. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

6. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from each and all of the following activities, policies, practices, and conduct:

(a) Regarding Classroom Activities and Instructional Settings. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to*: vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non- religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANNENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, or to quietly engage in religious activity during non-instructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place, and manner restrictions imposed on student distributions of non-religious materials, subject to the provisions of paragraph 6(e) below.

(b) Regarding Graduation or Commencement Exercises. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or non-school person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[1] provided that such expression is not encouraged in any by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services.

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[1] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION.

Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(c) Regarding Use of Public-Address Systems for Religious Addresses. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and non-school persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.

This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of non-curricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of non-religious activities.

(d) Regarding School-Sponsored Assemblies and Events. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or non-compulsory, and regardless of whether the speaker/presenter is a student, school official or non-school person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, which, while according students expressive rights, does not allow school officials to provide special privileges to non-curricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(e) Regarding Distribution of Bibles and Other Religious Tracts. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or non-school persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from non-school persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately*, that students shall not be harassed with regard to acceptance or non-acceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any non-school group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place and manner restrictions imposed on student distributions of non-religious materials.

(f) Regarding Parties, School Officials, and Potential Witnesses Connected With This Lawsuit. It is CONSIDERED that the Defendants be and the same are hereby ORDERED to direct school officials to intercede to stop religiously based harassment of the minor child, Jesse Chandler, by other students or by any school official or non-school person, if and when they observe it on school grounds or are notified of its occurrence on school grounds, including in the lunchroom of Fyffe School. School officials shall take immediate and prudent protective action when notified of any such occurrence or likely occurrence. Nothing in this provision is intended to chill the rights of students to persuade their fellow students on religious matters or to impose on school officials an affirmative duty to prevent conduct of which they have no notice, but rather to impose an obligation to protect a minor child from oppression where it is observed or comes to the attention of school officials.

It is further CONSIDERED that the Defendants, and each of them, be and the same are hereby ORDERED not to retaliate in any way against the Plaintiffs for filing this lawsuit, or to retaliate in any way against those persons identified in affidavits submitted by the Plaintiffs in this lawsuit as persons who support this lawsuit or who oppose school-sponsored religious activity in DeKalb County public schools, and specifically Mrs. Whiteside.

7. AND AS FURTHER AFFIRMATIVE RELIEF, IT IS CONSIDERED AND ORDERED THAT DEFENDANT DEKALB COUNTY BOARD OF EDUCATION SHALL:

(a) Distribute copies of the court's opinions and this PERMANENT INJUNCTION to each school principal within the DeKalb County system immediately, with instructions that each such principal inform faculty, staff, and students that the court requires compliance;

(b) Post, or make available, in areas commonly utilized for communicating notices or information to both students and faculty (such as the faculty lounge, bulletin boards, etc.) in each DeKalb County public school, a copy of this PERMANENT INJUNCTION, which shall remain so posted until the same expires;

(c) Maintain in the library available for circulation in each DeKalb County public school a copy of "The Riley Letter" in the form in which it appears as Exhibit A to the parties' Joint Motion to Vacate Trial Setting and Voluntary Cessation Agreement and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law," which shall remain available for circulation until this PERMANENT INJUNCTION expires;

(d) Distribute to the Parent Teacher Organization, Parent Teacher Association, Parent Teacher Student Association, or similar group for parental participation in school affairs, at each DeKalb County public school, a copy of this PERMANENT INJUNCTION and a copy of the court's opinions in this matter, with the following statement attached to it:

> The purpose of the court's injunction is to protect the religious rights and freedoms of students in DeKalb County public schools, to prohibit religious activities from being included in official school activities, and to prohibit DeKalb County public schools from sponsoring religious activities. If you believe that any of the rights and prohibitions specified in the injunction are not being observed at your child's school, you should contact [the court-approved monitor which/who shall be selected in accordance with the provisions of paragraph (g) below; name, address and telephone number shall be provided with this notice].

(e) Conduct a mandatory in-service training session for faculty and administrators in DeKalb County public schools that is reasonably designed to familiarize these school officials with the provisions of this PERMANENT INJUNCTION, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities. This in-service training shall be conducted during time regularly set aside for such purposes but shall occur during the 1997-98 school year. The Defendants shall not be obligated to conduct an in-service session for new faculty and administrators each year who were not present for the 1997-98 in-service training, but shall be required to direct all such new faculty and administrators to read and acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session, a copy of which shall be maintained by the DeKalb County Board of Education for this purpose.

The curricular materials used for this purpose shall be the court's opinions in this matter, this PERMANENT INJUNCTION, and in addition, one of the following: (a) the Anti-Defamation League's "A World of Difference" program; or (b) a similar program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor referenced in paragraph (g), below, for his, her, or its approval, with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections within ten (10) days of service. If a nomination is not made by the Defendants within forty-five (45) days of the date of this PERMANENT INJUNCTION, the court will select the curricular materials, with due regard for the recommendation of the court-appointed monitor.

The DeKalb County Board of Education shall pay the costs of the in-service curricular materials, and;

(f) Cause its counsel to certify to the court, each September 30, December 31, March 31, and June 15, for each school year until further order of the court, that each school within the DeKalb County school system is in compliance with this PERMANENT INJUNCTION, and to send a copy to the person or entity referenced in paragraph (g) below, the State Department of Education, and to Plaintiffs' counsel; and

(g) Within thirty (30) days of the issuance of this PERMANENT INJUNCTION, nominate and submit in writing, *in conjunction with counsel for the Plaintiffs*, three (3) neutral entities or persons, with a description of qualifications, to serve as a monitor for the purpose of insuring compliance with this PERMANENT INJUNCTION. The Parties shall *jointly* arrive at the list of three (3) neutral entities or persons nominated to serve as monitor. The court will appoint one of these three nominees to serve as its monitor. Failing the nomination of a neutral entity or person within thirty (30) days of the issuance of this PERMANENT INJUNCTION, or absent a nominee acceptable to the court, the court will appoint a monitor of its own choosing.

The monitor shall have the power and authority to:

(i) enter any classroom or public school property, school assembly, sporting event, commencement exercise, or school-sponsored or school-initiated event for the purpose of observing and reporting on compliance for the duration of this PERMANENT INJUNCTION; and

(ii) collect complaints regarding any violation of any provision of this PERMANENT INJUNCTION for the purpose of investigating violations and if warranted, reporting them immediately to the court; and

(iii) verify that there are no violations of the provisions of this PERMANENT INJUNCTION during each of the periods referenced in paragraph (f) above, and tender verification to the court within 10 days of the passage of the dates specified in paragraph (f) above; and

(iv) engage in *ex parte* communications with the parties and any persons or entities: (1) in the course of conducting investigations based on complaints; (2) in verifying compliance with this PERMANENT INJUNCTION; and (3) in furtherance of his, her or its responsibilities under this PERMANENT INJUNCTION; and

(v) engage in *ex parte* communications with the court.

The monitor shall be paid, by the DeKalb County Board of Education, a reasonable fee for services and expenses as shall be independently reviewed and approved by the court upon petition for fees within ten (10) days following the dates specified in paragraph (f) above in connection with monitoring compliance with the provisions of this PERMANENT INJUNCTION.

8. The court shall retain jurisdiction of this matter until further order of the court, with power to enforce the provisions of this PERMANENT INJUNCTION by all means, writs, and remedies available to it, including, but not limited to, the exercise of its powers of contempt for

violation of the terms hereof.

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The United States Marshal is hereby DIRECTED to personally serve a copy of this PERMANENT INJUNCTION, together with the FINAL JUDGMENT AND ORDER and MEMORANDUM OPINION, upon Defendants: the Honorable Forrest W. ("Fob") James, Jr., Governor of the State of Alabama; the Honorable William H. Pryor, Attorney General of the State of Alabama; the Honorable William Gray, Legal Advisor to the Governor; the Honorable Ed Richardson, Superintendent of Education for the State of Alabama; and the Honorable Richard Land, Superintendent of the DeKalb County Board of Education.

All costs herein incurred shall be and the same are hereby assessed against the DeKalb County Board of Education, for which let execution issue.

DONE this the 29th day of October, 1997.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

CV 96-D-169-N

vs.

FOB JAMES, *et al.*,

Defendants.

SUPPLEMENTAL OPINION AND ORDER

Pending before the court are several motions and procedural matters that the court finds are due to be addressed.

I. Plaintiffs' November 6, 1997 Motion To Enjoin The Etowah County Circuit Court Proceedings

On November 4, 1997, the Circuit Court of Etowah County issued a temporary restraining order, ("T.R.O."), "to prohibit the implementation of the District Court Permanent Injunction in this jurisdiction."[1] (T.R.O. at 3.) On November 6, 1997, Plaintiffs filed a "Motion To Enjoin Proceedings In The Etowah County Circuit Court." On the same date, the court issued an Order inviting all parties to respond to Plaintiffs' Motion on or before 2:00 P.M., November 10, 1997.

On November 10, 1997, the Defendant Attorney General of Alabama filed a Response stating that the Etowah County action, styled *Womack v. Etowah County Board of Education et al.*, CV-97-1282-RSM, was voluntarily dismissed by the plaintiffs in that action. A copy of the "Voluntary Dismissal Of Action" was attached to the Attorney General's pleading. In addition, and on the same date, the Defendant Governor of Alabama filed a Response in which he urged dismissal of Plaintiffs' Motion to Enjoin based on the plaintiffs' voluntary dismissal of the proceedings in the Circuit Court of Etowah County.

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[1] The court issued a Permanent Injunction in this cause on October 29, 1997 prohibiting and enjoining : (1) enforcement of Alabama Code § 16-1-20.3 by various state officials, and (2) specific religiously coercive practices in DeKalb County undertaken by school officials pursuant to Alabama Code § 16-1-20.3. The Permanent Injunction, as well as the court's March 12 1997 Memorandum opinion and order, also detail activities that are permitted pursuant to the First Amendment of the United States Constitution, as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2] Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines Inc. v. McCoy Restaurants Inc.*, 708 F.2d 582, 585 (11 Cir. 1983). The court is quick to note, however, that when a state court in effect asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Wesch v. Folsom*, 6 F.3d 1465 (11 Cir. 1993), *cert. denied*, 114 S. Ct 696; *Kelly v. Merrill Lynch*, 985 F.2d 1067 (llth Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (llth Cir. 1989); *McCoy*, 708 F.2d 582; *Southern Petrol. Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.*, 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution -- conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *Maryland v. Louisiana*, 451 U.S. 725,

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of

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746 (1981) (*citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore*, 611 So. 2d 1069, 1071 (Ala. 1993); *White v. Reynolds Metals Co.*, 558 So. 2d 912 (Ala. 1990), *cert. denied*, 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law require its citizens to follow those rights. (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code § 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

[3] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4 (a) (4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed

their Motion on the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot. to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as

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> no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with the requirements of Rule 59 (e). *See Fed. R. Civ. P.* 56(e) and 6.

[5] Rule 65 (d) provides:

> (d) Form and Scope of Injunction or Restraining Order.
>
> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. ...

Fed. R. Civ. P. 65(d).

well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.'" (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A)) Counsel stated that the purpose of the request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer.'" (*Id.* at 1.)

Counsel stated to the court that he sought a conference call with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12, 1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code § 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

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[7] Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a).

The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a). In the alternative, and in addition to the court's issuance pursuant to Rule 60(a), the court finds that Plaintiffs Motion To Alter Or Amend the Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24, 1997, to identify with specificity the evidence in the record at that time and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These submissions, pertinent to dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

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[8] The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of Alabama Code § 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

[9] This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997, and is detailed in these findings of fact and

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throughout the record. For example DeKalb Defendants Answers to Plaintiffs First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiff's Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories not answered on October 10, 1996) are part of Exhibit C to Plaintiff's Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filings responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents, affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of rewarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the defendants have recognized the wrongfulness of the conduct complained of;

and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years -- before and after Alabama Code § 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb

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[10] *See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (llth Cir. 1982)(discussing substantial likelihood of recurrence).

County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to continue with the status quo of unconstitutional conduct in DeKalb County public schools. (Nor is this the only such press clipping with which the court has been deluged in this case.) The court can discern in this evidence no recognition of the wrongfulness of school-sponsored religious activity, sees scienter in the vow to "resist" judicial action, and discerns no repentance of past unconstitutional conduct. The court does not mean to single out Mr. Carlisle for censure. The court finds this statement emblematic of DeKalb County school officials' historical attitudes – judging from the record before the court, this statement typifies an attitude. The court references it specially because it is so recent.

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the Fort Payne Times Journal spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

The court also finds relevant that in Spring 1996, all Parties executed an agreement that DeKalb County schools would not undertake any practices alleged by the Plaintiffs to be unconstitutional pending this court's determination of their constitutionality. This agreement, styled "Joint Motion to Vacate This Court's Order and Agreement of Voluntary Cessation of Certain Activity Pending this Court's Decision" (hereafter "Joint Motion"), was filed with the court in March 1996.

That document, in the court's view, constitutes a representation of the parties *to the court*, even if the court could not or would not enforce a voluntary agreement among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination -- and then continue with such conduct -- persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code § 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential cases.

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[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13] The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating

The Joint Motion promised that the school board Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

> "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"
>
> "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day. . . except that noncurricular clubs may meet

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hearing date.)

[14] Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

during noninstructional time;"

"prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

"distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;"[15]

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[15] The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

> "prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"
>
> "the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time."

(Joint Motion, ¶ 6 and subparts.)

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities. . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997 Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael

Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint

Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials professed ignorance of, the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed the videotape, and considers it powerful evidence of DeKalb County Schools' defiance of Eleventh Circuit law as pronounced in *Jager* almost a decade ago as well as evidence of DeKalb County's disregard for the proceedings pending here. The videotape features one of the intervenors,[17] a minor at Geraldine High

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[16] That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr. Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pre-game prayers prior to the

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filing of this lawsuit.

The court reiterates that there are two videotapes, one including pre-suit graduation exercises and pregame prayer in a series of short clips and ending with the October 19, 1996 prayer over the public-address system by Ms. Sexton at Geraldine High School, and the other depicting the 1997 graduation prayer at Collinsville, Plainview, and Sylvania as well as classroom prayer at Geraldine. The videotape filed November 21 with the Motion to Enforce includes the pre-suit graduation prayer as well as the post-suit October 1996 football game prayer. The first videotape is Exhibit B to the Plaintiffs' Motion to Enforce; the second, showing the 1997 graduation prayers, is Exhibit B to the June 9, 1997 Declaration of Michael Chandler. (*See* Affidavit of Michael Chandler, Feb. 1, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's Designation of Exhibits and Materials already in the Record for Rule 56 Purposes, n.4 (filed November 21, 1996).)

[17] The intervenors were allowed in for the limited purpose of *amicus curiae* participation. The court accepted affidavits from them. Had they intervened timely, when this suit was filed or before summary judgment submissions and the court's March 1997 opinion, the court would have granted intervention. The intervenors' affidavits do not merit separate or extended discussion. Bible Clubs may meet consistent with the Equal Access Act; religious jewelry may be worn; students may wear "Victory Line" t-shirts of the sort depicted in Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the Alternative, Motion to Strike, consistent with school policy; students may organize the "Meet Me at the Pole" event; and may generally do

School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and

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all the things the court discussed at pages 23 and 24 of its earlier opinion -- and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

prayer in the classroom at Geraldine School. Once again, some of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as ¶ 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian address' or the designation of a student as 'historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

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[18] The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse*. Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

Mr. Chandler further testified in his June 9 Declaration that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch;

the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'one, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive- audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

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[19] *See* Exhibit A to Joint Motion.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the

> lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that "'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 opinion and Order, which makes express reference to the Eleventh Circuit's specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order. In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 - 3rd period - (Friday) - BACCALAUREATE PRACTICE - This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program -- just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this intermingling of the private religious service with the school-sponsored graduation ceremony;

the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In ¶ 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August

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[20] The court notes that "tradition" contemplates ongoing, repetitive conduct.

3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials: The letter expresses Mr. Chandler's concern that school officials had expressed that they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, ¶ 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a. permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See*, e.g., Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n.3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct; including a teacher's asking for student volunteers to pray was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with, DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb county filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce the terms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[21] Here, however, officials flagrantly defied the Eleventh Circuit rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 0pinion and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

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[21] *See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, ¶ 16.)[22] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in

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[23] Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

which it proceeds is out loud and in unison.

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state may not favor religion, even over-nonreligion.[24]

Most importantly, the court is disturbed by the uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in- service training repetitively or for all new hires but requires merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

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[24] *See County of Allegheny*, 492 U.S. at 590-91; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code § 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions" as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (2971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants Requests 5, 9, 11, 12, DeKalb

Defendants Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges -- the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

Stipulations resolve some issues.[25] Thus the court finds "[p]laintiff Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including school-related student assemblies, compulsory and non-compulsory school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

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[25] The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe School, which schools have students in grades K through 12." (Stipulation 15.)

The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation 58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See and compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").)[26]

The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb county, ¶ 18.) Specifically, Mr. Chandler testified in his February 1, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

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[26] Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27] Meaning the year preceding filing of the lawsuit.

The court notes that the DeKalb County Defendants,.in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at Plainview High School May 26, 1995 and that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February 1, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February 1, 1996 Affidavit of Michael Chandler.) Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb

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[28] The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager*, 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer.

Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code § 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb County, ¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995

Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code § 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code § 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

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[29] The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30] The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31] The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the First Amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee*, the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

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[32] The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33] *Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp* , 374 U.S. 203, 224-25 (1963).

[34] *See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

In the Eleventh Circuit, pursuant to *Jager*, "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school- sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that even nonsectarian prayer is proscribed.[37] The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

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[35] *See also Schempp*, 374 U.S. at 226; *Engel*, 370 U.S. at 430.

[36] *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for

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[37] *Lee*, 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are nonsectarian – because the school board has claimed the statute authorizes the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in sectarian prayers, either.

[38] *See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See*, *e.g.*, 1995 program for Plainview High School showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February 1, 1996 Affidavit of Michael Chandler, excuse students from class for baccalaureate practice.[39]

Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and, that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

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[39] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203 (1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in "homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February l, 1996 Affidavit, "From what I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the fifth and twelfth grades. Mr. Chandler testified in his February 1, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the 12th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request f or Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

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[40] In *Schempp*, Bible readings opened the school day; the practice was struck as unconstitutional. *See also Berger*, 982 F.2d 1160, 1171 n.6 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school, a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that he permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41] The classroom is not traditionally a public forum.[42] The court notes that in *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] "The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

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[41] *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[42] *See Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43] The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

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[44] *Berger*, 982 F.2d at 1167.

[45] *Id.* at 1168.

[46] *Id.*

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the injunction can be modified to embody only the reasonable time restrictions of the policy.[47]

Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95 school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

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[47] The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, "Defendants admit that Ms. Carroll asked for volunteers to lead prayers." Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, student-initiated voluntary prayer, non-proselytizing, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and may regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50]The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

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[48] At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary qualities and that "such study of the Bible, when and historic presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

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[49] *Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd..*, 884 F. Supp. 1097 (E.D. Va. 1993).

[50] *Lee*, 505 U.S. at 592-95.

The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 opinion and order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.) This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe

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[51] DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18, 1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education. (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R:E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'nonsectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp's* admonition that no breach is trivial controls the court's analysis.

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[52] *See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview School. The court specifically finds that DeLayne Etherton's affidavit establishes that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God We Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

Plaintiffs' November 6, 1997 Motion to Enjoin Proceedings in the Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend: Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc*.

The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this

Supplemental Opinion and Order.[53]

The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[53] In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its Findings Of Fact And Conclusions Of Law articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions.

The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

[54] The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER.** Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States

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Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of neutrality toward religion." *Jager v. Douglas County School District*, 862 F.2d 824, 828 (11 Cir. 1989)(citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale*, 370 U.S. 421, 434 (1962).)

The right to be free from state-established religion lies at the heart of the concept freedom embodied in the First Amendment to the United States Constitution. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree*, 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist or agnostic schoolchildren to participate in Muslim religious activities just as the

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state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only -- under the First Amendment, each individual is entitled to their own beliefs free from state intrusion).

Regardless of whether state officials state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree*, 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53. ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, **the court's Permanent Injunction DOES NOT restrict schoolchildren's First Amendment rights** – *it actually protects those rights from unwarranted and unconstitutional interference from the state.*

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CV 96-D-169-N**

FOB JAMES, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER[1]

The court finds it necessary to vacate the portions of its October 31, 1997 Order denying as moot Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. All other aspects of the court's October 31, 1997

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[1] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a)(4); *Grigqs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982); *see also* Court's Supplemental Opinion and Order, notes 3-7 and accompanying text, issued concomitantly with this Memorandum Opinion and Order.

Order shall remain in full force and effect. For the following reasons, the court finds that Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment is due to be granted. The court previously granted leave for Plaintiffs to file their Motion For Partial Summary Judgment out of time.

The Plaintiffs have brought several closely related claims in this lawsuit. First, in Count One, they challenged Alabama Code section 16-1-20.3 as violative of the First Amendment on its face. The Plaintiffs sued Alabama's Attorney General, in his official capacity, as he is charged with the enforcement of Alabama statutes. The Plaintiffs also sued the State Board of Education and all of its members, including the State Superintendent of Education and the Governor, and the President of the State Board of Education, all in their official capacities. These parties, charged with implementing Alabama's laws regarding education, promulgated an administrative regulation, based on Alabama Code Section 16-1-20.3. The DeKalb County Board of Education carried out the statute and the regulation in the DeKalb County schools, where Michael Chandler works and where Jesse Chandler attends. This court has already addressed the facial statutory claim in its March 12, 1997 Opinion and Order ("March 1997 Opinion and Order"). There, the court found that § 16-1-20.3

violated both the Free Exercise Clause and the Establishment Clause of the First Amendment. The facial claim has been resolved as against these Defendants by the court's March 1997 Opinion and Order.

Based, in part, upon the court's findings in its March 1997 Opinion and Order, the court now finds that Plaintiffs are entitled to judgment as a matter of law on all of their claims discussed below. The court has made extensive factual findings in its Supplemental Opinion and Order issued concomitantly with this order, discussing injunctive relief, and it has delineated there general facts related to injunctive relief as well as summary judgment facts. The court does not recapitulate in toto those factual findings here, but rather, summarizes the facts at summary judgment and focuses on the law, including the burden the DeKalb County Board of Education bears at summary judgment.[2]

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[2] While the DeKalb County Board filed affidavits, it did not make reference to them in its brief nor suggest in its brief that there were "genuine issues of material fact" which remain to be resolved. Instead, the DeKalb County Board argued that if the court were to rule on the facial challenge to the statute, most of the issues in this case would be resolved. The Governor, over the Plaintiffs' protests, did oppose the motion for partial summary judgment against DeKalb County, filing a brief which dealt extensively with the filed affidavits.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56*(c). As the Supreme Court has explained the summary judgment standard:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)(citations omitted). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (llth Cir. 1989).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e).

In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." *Fed. R. Civ. P.* 56(c); *Matsushita*, 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587; *see also Anderson*, 477.

In other words, the moving party must show a legal basis for the court to enter judgment, but it does not have to shoulder the burden of production. Once the moving party has made such a showing, it falls to the nonmoving party to produce evidence sufficient to establish the truth of each element on which it will bear the burden of proof at trial.

In *Celotex*, for example, the defendant, relying solely on the plaintiff's discovery responses, moved for summary judgment. Without producing any evidence that tended to negate the plaintiff's claims, the defendant argued that the plaintiff could not prove her claims at trial. In upholding the trial court's grant of judgment in favor of the defendant, the *Celotex* Court held that at summary judgment, the nonmoving party must support his or her claims. The moving party does not have to disprove them. It held that nothing in Rule 56 requires a moving party to support its motion with affidavits or with anything else that would disprove the nonmoving party's (usually the plaintiff's) claims. *See Celotex*, 477 U.S. at 323. The moving party does not even have to prove the nonexistence of a genuine issue of material fact, but rather the nonmoving party must demonstrate that genuine issues for the fact finder do exist. *Id.*; 325. U.S. at 249.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION[3]

It is with these principles in mind that the court views the Governor's submission on behalf of DeKalb County and the affidavits filed by DeKalb County itself. Even when taking Defendants' responses into consideration, and under the standards enunciated herein, the court still finds that Plaintiffs are entitled to summary judgment. While the affidavits deny the existence of any "religious" activities, the witnesses simultaneously acknowledge that Bible readings, prayers and "devotionals" have taken place at various DeKalb County school-sponsored settings. Under *Celotex*, this is not a showing sufficient to demonstrate the existence of a genuine issue of fact. Whether a "devotional" took place may be a fact for resolution by the fact finder, but whether an admitted "devotional" given over the intercom during the school day violates the First Amendment is a matter of law for the Court to decide.

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[3] Because of the factual nature of this inquiry, the court combines its analysis.

The court is mindful that it must draw inferences in favor of the nonmoving party. Nevertheless, when the nonmoving party, here DeKalb, as represented by the Governor, offers testimony in an affidavit that is internally contradictory, the court does not believe that it is under an obligation to ignore facts admitted by the witness (*i.e.*, that Bible readings or prayers occurred) in favor of that witness' characterization of the same event (the Bible readings and devotionals that ended with a prayer were "not religious"). Similarly, the court does not believe that it is under an obligation to assume for purposes of summary judgment that an event did not occur, when, in response to the allegations of the Plaintiff, the Defendants' witness states that he or she does not remember whether the event took place or not. The court does not believe that this is a showing sufficient to "negate [the plaintiff's] claims" and demonstrate the existence of a material issue of fact.

I. Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs moved for summary judgment as to several religious practices ongoing in DeKalb County.

Some of these overlap with the issues on which Plaintiffs also sought judgment on the pleadings. The court notes at the outset that stipulations among parties are admissible for Rule 56 purposes and require no extrinsic evidence. *Hadady Corp. v. Dean Witter Reynolds*, 739 F. Supp. 1392, 1395 n. 2 (D. Cal. 1990).[4] The same is true of undisputed documents. *See* 10A Wright, Miller & Kane, *Federal Practice & Procedure*, Sec. 2730.1 & nn. 10-11, at 84-85. The court may also consider affidavits earlier submitted in a motion for preliminary injunction. *Clinkscales v. Chevron USA Inc.*, 831 F.2d 1565 (llth Cir. 1987). Any exhibits in the court file at summary judgment may be admitted, regardless of the reason for their initial submission. *McLaughlin v. Liu*, 849 F.2d 1205, 1206 n.3 (9th Cir. 1988).

A. Prayer at Football Games

In his affidavit, filed along with the Complaint, Michael Chandler offered testimony regarding prayers at the DeKalb County high school football games in paragraphs 8-16. Therein, he specifically testified that he has personally witnessed such prayers; that he has been offended on his behalf and on behalf of his son Jesse; and that he videotaped some of these prayers, including one at Valley Head High School, where he must attend all home games,[5] that occurred September 1, 1994. His Declaration under Penalty of Perjury of November 10, 1996 similarly contains testimony that students have been leading prayers at high school football games.[6] None of the Defendants has offered testimony that contradicts any of evidence or that constitutes a genuine question of material fact.[7]

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[4] The Eleventh Circuit has held, in a ruling based on stipulated facts, that if evidence is capable of different reasonable interpretations, findings based on one of these reasonable interpretations are not clearly erroneous. *GLBA v Pryor*, 110 F.3d 1543, 1546-47 (llth Cir. 1997). (*quoting L & C Marine Transport Ltd. v. Ward*, 755 F.2d 1457, 1461 (llth Cir. 1985)).

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[5] *See* Amended Answer of DeKalb County Board of Education, ¶ 19. See also Plaintiffs' Designation of Exhibits filed November 21, 1996 and Affidavit Of Michael Chandler February 1, 1996.

[6] Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement is the videotape which according to the Chandler February 1, 1966 affidavit includes the September 1, 1994 Valley Head prayer. It also includes filmed prayer after this lawsuit was filed at Geraldine High School, but for purposes of summary judgment, the court does not consider the Geraldine prayer.

[7] It is not the court's province to judge Mr. Parrish's veracity at this stage. Assuming that he is telling the truth and that pregame student or clergy-led prayers had ceased during the 1996 school year, this is not a defense to the Plaintiffs' motion for summary judgment.

If a defendant could assure itself victory in a lawsuit simply by promising to "be good" in the future, the courts would be overrun with parties repenting of their past wrongdoing -- temporarily. It is axiomatic that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case. . . ." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see*

The practices which DeKalb has admitted in its Stipulations, ¶¶ 51, 53 and 55, are unconstitutional, regardless of any purported explanation for them. *See Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 830 (1989), *cert. denied*, 490 U.S. 1090 (1989); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth cir. 1984). The court has so found in its March 1997 Opinion and Order.

B. Bible Readings and Devotionals at Assemblies

The DeKalb Defendants have admitted that students gave "words of inspiration" and a teacher sang a religious song at a D.A.R.E. graduation attended by all fifth grade students. (Defendants' Response ¶¶ 28-32).[8] They do not deny, as the Plaintiffs allege in Stipulation number 30, that these words included a reading from the Old Testament. (Stipulation 30.) Rather, they "admit that two students

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also United States v. Oregon State Med. Soc'y, 343 U.S. 326, 333 (1952).

Mr. Parrish does not deny that pre-football game prayers have occurred in the past, but rather he claims that this activity has stopped after the lawsuit was filed. (Parrish Aff., ¶ 6.) Even assuming that this were true, voluntary cessation of allegedly unconstitutional conduct is not a defense.

[8] While the D.A.R.E. program is not compulsory, all fifth graders in DeKalb County participate. *See* Stipulation 28.

volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." (Stipulation 30.) In supplemented discovery apparently served February 4, 1995, the DeKalb Defendants equate "words of inspiration" with a "devotion."[9] In addition, the DeKalb Defendants admit that student-led devotionals have occurred during school-sponsored events and over the public address system. (Defendants' Response ¶¶ 30, 50). Michael Chandler's February 1, 1996 affidavit similarly offers testimony of student-led devotionals. While Donna Taheri testified to her opinion that student devotionals are merely inspirational rather than religious, and to her recollection that "there has never been a religious activity of any description at a D.A.R.E. ceremony," testimony elsewhere in her affidavit indicates that some students at D.A.R.E. graduation ceremonies gave Bible readings.

In response to Plaintiffs' Interrogatory Number 5, "Do the DeKalb defendants contend in this lawsuit that this May 18, 1994 action by these two students was 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions?," the DeKalb defendants responded, "Yes" in addition to equating "words of inspiration" with "devotion[s]." The court finds it reasonable to conclude that mere "words of inspiration" would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions, in hopes of thereby insulating them from scrutiny. The specific invocation of the statute would not be necessary for secular "words of inspiration," and DeKalb has expressly invoked the language of the statute in discovery responses.

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[9] The supplemental discovery, response to interrogatory number 5, is appended as Exhibit C to Plaintiffs' April 1, 1997 Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time.

The same is true of conceded devotionals at Plainview School, referenced in Stipulation 50 and similarly answered "Yes" in response to the same contention interrogatory referencing that specific conduct. (In Stipulation 50, the DeKalb Defendants actually term the exercise "devotionals" and then additionally invoke the language of the statute.)

The court finds that a devotional is generally understood to be religious and that the affidavit of Bill Ayers refers to devotionals that took place at Plainview. He also testified to student messages over the intercom during the Gulf War that were of "a devotional character, . . . but not religious," in ¶ 5 of his affidavit, while simultaneously testifying in ¶ 3 that he had no recollection of devotionals being broadcast. He testified that student messages "of a devotional character" contained "no religious references" although "there may have been an occasional brief religious reference or prayer." (Ayers Aff., ¶ 5.) The students giving the messages "did not pray and read the bible" "each" of the "three or four, maybe five times" they led the devotionals, according to Mr. Ayers.

He also testified to a devotional over the public-address system on Veterans Day 1995. DeLayne Etherton testified that this "devotion, meditation, or other inspirational message" ended with a prayer. (Etherton Aff., ¶ 8.) Like Mr. Ayers, DeLayne Etherton cannot recall "if a Bible reading or prayer was given" on other occasions "although there may have been, but not each time."

DeLayne Etherton cannot specifically recall the content of these "so-called 'devotionals'" that were "not necessarily" prayer and Bible reading. DeLayne Etherton does recall, however, that the Veterans Day message ended with a prayer but "was not of a religious nature." (Compare Etherton Aff. ¶ 8 with ¶ 6.)

At this juncture, *Celotex* comes into play. Testimony about "nonreligious" devotionals that ended with a prayer and that were conducted with the protection of a statute that permits "student-initiated prayer, invocations and benedictions" at school events does not establish a genuine issue of material fact.

Similarly, a witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden. The nonmoving party must come up with evidence that negates the version of events alleged by the moving party -- an acknowledgment that the event may have occurred, but the witness cannot remember, falls short.

The court cannot reconcile these observations with the truism that prayer is a quintessentially religious act. The court further notes that, despite protestations that messages were merely inspirational or patriotic from all of DeKalb County's affiants, once again, it answered the Plaintiffs' contention interrogatory referencing student-initiated prayer in the language of the statute, "Yes."

The admissions of ¶¶ 30 and 32 of the DeKalb Defendants' response are admissions of constitutional violations. See *Engel*, 370 U.S. at 226; *Schempp*, 374 U.S. at 203. These activities are unconstitutional, even if the religious devotionals were led or given by students. *Schempp*, 374 U.S. at 207 (prayer and Bible reading); *Treen*, 653 F.2d at 902 (prayer); *Ingebretsen*, 88 F.3d at 279; *Hall*, 656 F.2d 999 (student-led devotionals); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573-73 (5th Cir.), aff'd rehearing en banc, 577 F.2d 311, 312 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (student-led devotionals); *Herdahl v. Pontotoc Count Sch. Dist.*, 887 F. Supp. 902, 908-09 (N.D. Miss. 1995) (student-led devotionals over public-address system are not within the ambit of Equal Access Act, 20 U.S.C. 4071 et seq; Bible readings followed by short prayer speak to a captive audience through state machinery).

None of the affiants aid DeKalb County in establishing a genuine question of material fact as to prayer and devotionals -- it is admitted in the affidavits, and in stipulations that predated them -- that prayer occurred. The court concludes that there is no *de minimis* exception for Establishment Clause 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832 (irrelevant that pregame prayers are brief and football season is short). Nor is the court persuaded that an exception, exists for perceived crises and wartime. Indeed, the court would suspect that we might be most vigilant about the Establishment Clause at precisely such times. *See generally Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985).

C. Prayer in Classrooms

It is uncontroverted in the pleadings and in the record that there has been prayer in classrooms, as Plaintiffs allege. The court notes that the DeKalb County Defendants have responded to Plaintiffs' interrogatories regarding faculty solicitation of student volunteers to lead classroom prayer with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants; DeKalb Defendants' Answers to Plaintiffs First Set of Interrogatories, "Yes").

Further, Michael Chandler testified in his affidavit that Ms. Carroll allowed prayer in her classroom and selected students to lead prayers over the course of several years, including in 1995. Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades, and her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-1995 school years. Mr. Chandler testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

As noted, the Defendants do not challenge this evidence. Indeed, they offer no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers." Defendants also admit that Ms. Carroll read aloud from the

Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that Ms. Carroll asked for volunteers to lead prayers.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non- proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and regardless of whether prayers are nonsectarian or students may be excused from the classroom.[10] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment

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[10] *Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), cert. denied, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.*, 884 F. Supp. 1097 (E.D. Va. 1993).

Clause.[11] The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary and historic qualities and that "such study of the Bible, when presented objectively as part of a "secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

D. Distribution of Bibles and Religious Literature by Nonstudents

The DeKalb Defendants admit in their responses to stipulations that they permit representatives of Gideons International to distribute New Testaments to public school students in the classroom. (Stipulation ¶ 35.) Gideons representatives have been allowed to enter classrooms and make presentations to the students. (Powell Aff., ¶ 5.) Jesse Chandler was in a classroom where such presentations and distributions took place and felt compelled to accept a Bible. (Chandler Aff., ¶ 21.) The court does not seek to resolve any factual issue as to the content of any presentation the Gideons might make, because it is not material in view of the fact that the Gideons are impermissibly in the classroom during instructional time.

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[11] *Lee*, 505 U.S. at 592-95.

Courts have uniformly held that school officials are prohibited from permitting outside groups and individuals to distribute Bibles and other religious literature to students on public school property. See *Berger v. Rensselaer Central Schl. Corp.*, 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993); *Gregorie v. Centennial Schl. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Lubbock C.L.U. v. Lubbock Indep. Schl. Dist.*, 669 F.2d 1038, 1040, n.38 (5th Cir. 1982).[12] The reason for this proscription is that students are a captive audience in such situations and face school and peer pressure to accept the Bibles. In addition, such Bible distributions interfere with the rights of parents to raise their children according to family religious traditions. See *Schempp*, 374 U.S. at 226.

Bible distribution creates the impression of school endorsement of the religious activity and, as at least one court has noted, facilitates the accomplishment of the religious mission of groups such as the Gideons. *See Berger*, 982 F.2d at 1171. Such distribution here expressly occurred with the permission of school officials, such as Mr. Ashley and Ms. Powell at Fyffe. Superintendent Parrish testified that there is no formal written policy governing distributions of materials. (Parrish Aff., ¶ 8.) Policy is established by the individual school principals, and varies widely. (See Parrish Aff., ¶ 8; Ashley Aff., ¶ 8.)

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[12] Public school classrooms and buildings are not public fora such that outside groups have any cognizable free-speech interest in distributions. *Berger*; 982 F.2d at 1166. Here, of course, the issue is distribution inside public-school classrooms during instructional time.

Ms. Powell and Mr. Ashley testified that a distribution that occurred after homeroom was aberrational. (Ashley Aff., ¶ 6; Powell Aff., ¶ 5.) This testimony is not material because it does not affect the legal question concerning whether homeroom time is instructional time for establishment clause purposes.[13] Thus, any attempt to explain away the unconstitutional activity as an aberration or exception is unavailing. (See, e.g., Ashley Aff., ¶ 6.) Defendants admit that they allowed Bible distribution to occur in a classroom setting, with participation of school officials; an atmosphere rife with potential for both proscribed endorsement of religion and peer pressure. A practice of in-school distribution immediately before the first class period is still constitutionally infirm. (See Powell Aff., ¶ 5.) The court is not persuaded by the "homeroom period is noninstructional time" argument made by all the Defendants' affiants on the subject.

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[13] The court notes that the Equal Access Act applies only to secondary, not primary schools. It is not implicated as regards the Gideon distributions at issue here.

Michael Chandler testified that all students are required to attend homeroom periods and that DeKalb County schools are closed campuses and that students are not free to leave. (Chandler Dec. of November 10, 1996.) Nowhere in the record is this testimony controverted. Moreover, the court finds that the question of what is "instructional time" for purposes of the Establishment Clause in such situations is resolved by *Schempp*. *Schempp* explicitly involved Bible readings which opened the school day. They were not given during time otherwise reserved for academic instruction, but rather, during homeroom, and were struck as unconstitutional. The classroom is not traditionally a public forum. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392; *see also Berger*, 982 F.2d at 1167.

The distribution of Bibles or other religious material by nonschool persons during the school day, regardless of the exact location where that distribution took place (even outside the actual classroom), and purportedly involving only "willing" students, has been almost uniformly held unconstitutional. The critical factors for the courts are that students will feel compelled through peer pressure to accept the Bibles and will sense state endorsement. *Berger*, 982 F.2d at 1166-1167 & n.7 (Gideon distribution at school "gives the Bible distribution an official quality."). The court finds that Defendants' practice of allowing Gideons and other outside groups to distribute Bibles and/or other religious materials to students during the homeroom period violates the Establishment Clause.

E. Miscellaneous Matters

The court notes that initially, the DeKalb Defendants did not file a response to the Plaintiffs' motion. However, the Governor responded to the motion filed against the DeKalb Defendants and concerning only events which took place in DeKalb County schools. The DeKalb Defendants then filed a separate opposition to the Plaintiffs' Motion for Partial Summary Judgment, which ignored the affidavits purportedly offered on their behalf, made no reference to evidence, and relied on section 16-1-20.3 as DeKalb's sole justification for its actions. DeKalb County urged the court to rule on the facial validity of the statute before any other matters, representing that this would moot these remaining matters.

Plaintiffs moved to strike DeKalb affidavits on a number of grounds that were briefed extensively. The court finds that it need not do so, however, because it finds that DeKalb County has failed to meet its burden of adducing any evidence suggesting that a genuine question of material fact exists. Further, the matters raised in the affidavits purport to insinuate defenses to the Plaintiffs' claims. Legal conclusions about homeroom time, speculations about a witness' thoughts and motives, contradictions of earlier materials in the record while still offering admissions, and espousals of the theory that patriotism or national crisis justifies violation of the Establishment Clause do not meet the burden of resisting summary judgment here.

Asking the court to decide the facial issue first is not evidence. Likewise, the court has already rejected the Governor's theory that the Free Exercise Clause negates the Establishment Clause:

> Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. If the Free Exercise Clause were an absolute mandate, it would subsume the Establishment Clause. Paradoxically, making "Free Exercise" an absolute mandate

> would. . . effectively destroy "freedom of religion" as we know it.
>
> . . .
>
> Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. . . . If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. . . . Similarly it is easy to see how the absolute protection of religious activity would quickly lead to an establishment of religion.

March 1997 Opinion and Order at 6-7 (internal citations omitted).

In response to the argument that the statute, by allowing "nonproselytizing, nonsectarian student initiated prayers at compulsory and noncompulsory school-related events," did no more that set forth the students' Free Exercise rights, the court has noted:

> Under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendant argues that the statute does no more than

> recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute . . . . section 16-1-20.3 . . . authorizes religious activity in our public schools which is plainly unconstitutional.

March 1997 Opinion and Order at 36 n.31.

The court likewise finds no merit in the argument that state action is lacking. This argument, too, has been rejected by the court in its March 1997 Opinion and Order. In discussing the constitutionality of "voluntary" or "student-initiated" prayer, the Court discussed the relationship between student choice and state action:

> Moreover, in the public school setting, federal courts have repeatedly struck down legislation and practices permitting prayer, even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale*, the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate.
>
> . . .
>
> Similarly, because the resources and

> facilities of the state are utilized when a "student-initiated' prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion.

March 1997 Opinion and Order at 10-11.

As to all of Plaintiffs' claims, the court rejects the apparent *de minimis* argument. The Governor argues that nonpervasive First Amendment violations are unworthy of the court's notice. (*See* Gov. Br. at 17 (prayer before a football game is "a minute part of the program;) Gov. Br. at 14 (any incidental religious comment does not work an establishment of religion"); Gov. Br. at 12 (no constitutional violation occurs where religious activities are not "pervasive"); *see also* Powell Aff., ¶ 5 (Gideon presentation was "short").) The argument is, as already noted, unavailing. *See Engel*, 370 U.S. at 436; *Schempp*, 374 U.S. at 224-25.

Most recently, in *Lee v. Weisman*, the Supreme Court was again confronted with the claim that a brief "nonsectarian" prayer occurring once in a lifetime was a de minimis act. The Court again rejected the de minimis argument:

> It is, we concede, a brief exercise during

> which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority . . . [T]he intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

Lee, 505 U.S. at 594.

In *Jager v Douglas Countv School District*, 862 F.2d 824 (llth Cir.), *cert. denied*, 490 U.S. 1090 (1989), Judge Johnson rebuffed the school district's contention that a prayer of 60 to 90 seconds is a "*de minimis* violation." Id. at 832. Judge Johnson wrote:

> This approach is flawed. It is 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment'. . . . The Establishment Clause does not focus on the amount of time an

> activity takes, but rather examines the religious character of the activity. As the Fourth Circuit recognized . . . '[a] prayer, because it is religious does advance religion and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause.'

Id. (internal citations omitted).

Nothing in the evidence rescues the Defendants from the mandates of *Celotex*. Nothing in the evidence suggests either a valid defense or a genuine question of material fact. The Defendants' affidavits do not do so. Accordingly, the court finds that summary judgment is due to be granted.

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

That portion of the court's October 31, 1997 Order denying as moot. Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby VACATED. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect.

Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby GRANTED.

The court's Supplemental Opinion and Order, issued concomitantly, on this date, with this Memorandum Opinion and Order shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[14]

DONE this the 12th day of November, 1997.

/s/ Ira DeMent

UNITED STATES DISTRICT JUDGE

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[14] See the court's Supplemental Opinion and Order, also issued on this date, at footnote 53 and accompanying text.

Appendix I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

Filed
U.S. Court of Appeals
Eleventh Circuit
Apr 13, 2001

Thomas K. Kahn
CLERK

D. C. Docket No.
96-CV-169-N

MICHAEL CHANDLER, individually
and as next friend of his son,
Jesse Chandler, *et al.*,

Plaintiffs-Appellees,

versus

DON SIEGELMAN, in his official capacity
as Governor of the State of Alabama and
President of the State Board of Education,
BILL PRYOR, in his official capacity as
Attorney General of the State of Alabama

et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

ON PETITION FOR RE-HEARING EN BANC
(Opinion October 19,2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, B1RCH, DUB1NA BLACK, CARNES, BARKETT, HULL, MARCUS, and WILSON, Circuit Judges.

ORDER: The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

/s/
R. Lanier Anderson
Chief Judge

Appendix J

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALABAMA'S SCHOOL-PRAYER STATUTE

ALABAMA CODE § 16-1-20.3

(a) The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article 1, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

(b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

(c) Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

(d) The exercise of these rights on public school or other public property, or on other property for school-related activities, by students or others, shall not be construed to indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

Ala. Code § 16-1-20.3 (1995).